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In The

Supreme Court of the United States

JEANNE S. WOODFORD, WARDEN, A.P. KANE

Petitioners,

v.

VIET MIKE NGO

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT

[Law Professors Listed On Inside Cover]

KERMIT ROOSEVELT III
University of Pennsylvania
Law School
3400 Chestnut St.
Philadelphia, PA 19104
215.746.8775

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF *AMICI* AND COUNSEL*

ERWIN CHEMERINSKY
Alston & Bird
Professor of Law and
Political Science
Duke University

DAVID L. FRANKLIN
Assistant Professor
DePaul University
College of Law

AMANDA FROST
Assistant Professor of Law
American University
Washington College of Law

ALAN HYDE
Professor and
Sidney Reitman Scholar
Rutgers University
School of Law
Visiting Professor,
Cornell Law School

SETH KREIMER
KENNETH W. GEMMILL
Professor of Law
University of Pennsylvania
Law School

DANIEL MANVILLE
Clinical State Attorney
Wayne State University
School of Law

TREVOR MORRISON
Assistant Professor of Law
Cornell Law School

JOHN OAKLEY
Professor of Law and
Associate in the
Department of Philosophy
University of California
at Davis Vice-Chair,
Academic Senate of the
University of California
Faculty Representative,
Board of Regents of the
University of California

MALLA POLLOCK
Professor, American Justice
School of Law
Visiting Professor,
University of Idaho,
College of Law

JON ROMBERG
Associate Professor
Seton Hall University
School of Law

KERMIT ROOSEVELT III
Assistant Professor
University of Pennsylvania
Law School

DAVID RUDOVSKY
Senior Fellow
University of Pennsylvania
Law School

ANDREW M. SIEGEL
Assistant Professor of Law
University of South
Carolina School of Law

---

* Institutional affiliations are provided for identification purposes only.

CATHERINE STRUVE
Professor of Law
University of Pennsylvania
Law School

STEPHEN I. VLADECK
Associate Professor
University of Miami
School of Law

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are law professors who teach and write in the areas of federal jurisdiction, constitutional law, and civil rights. They believe that this case presents a question of great importance regarding the availability of federal judicial relief for violations of inmates' constitutional rights. They seek to bring to the Court's attention an analytic point outside the parties' main focus, which they believe offers substantial guidance in deciding this case. Amici have no financial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Neither petitioners nor the Solicitor General acknowledge the key distinction between original proceedings, which seek judicial review of out-of-court conduct, and review proceedings, which seek review of the decision of some other adjudicator. In the context of review proceedings, procedural errors in the course of exhaustion naturally create bars because the decision under review will rest on a procedural ground. In such circumstances, both when applying the procedural default doctrine in habeas jurisprudence and when applying waiver or forfeiture rules in administrative law cases, federal courts will typically not reach the merits of the litigant's claims. But

[1] The parties have consented to the filing of this amicus brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae and their counsel has made a monetary contribution to the preparation and submission of this brief.

this rule is not the operation of an exhaustion requirement alone; it stems from the nature of review proceedings.

In original proceedings, by contrast, procedural errors in an unrelated proceeding do not create bars. Although original proceedings following exhaustion requirements are rare, courts in such cases reach the merits despite procedural errors. Title VII and the Age Discrimination in Employment Act are instructive examples, as is this Court's habeas jurisprudence under the regime of *Fay v. Noia*, 372 U.S. 391 (1963).

Once the confusion between original proceedings and review proceedings is clarified, petitioners' position boils down to policy arguments that the goals of the Prison Litigation Reform Act will be defeated without some judicially-created analogue to the procedural default doctrine. A closer analysis of the PLRA reveals, however, that such a rule is not necessary to protect the statute's aims. The PLRA has succeeded quite well in reducing frivolous lawsuits without any procedural bar, and imposing one would preclude a substantial number of meritorious claims, something the PLRA's drafters did not intend.

ARGUMENT

I. Original Proceedings Differ from Review Proceedings

The conceptual key to this case is a distinction, which neither petitioners nor the Solicitor General address, between two different types of legal proceedings. In the first type, an original proceeding, the court is simply determining the legality of out-of-court action. The plaintiff asserts that some actor has violated his rights and

asks the court to assess the legality of that actor's conduct. Most actions filed in federal district court are of this sort, with habeas petitions being the most notable exception.

The second type of proceeding, a review proceeding, asks a court to review the decision of some other adjudicator. In this second type of case, the court need not make its own decision as to the legality of the out-of-court action that formed the basis for the claim presented to that initial adjudicator. It need only determine whether the other adjudicator's decision should be sustained or overturned. An ordinary appeal is the most obvious example of this type of claim. Other examples include habeas petitions, which ask federal courts to review the decisions of state courts, and suits under the Administrative Procedure Act or agency-specific statutes, which ask them to review agency decisionmaking.

An exhaustion requirement imposes a prerequisite to a federal judicial hearing. It ensures that some other decision will precede the federal hearing, and it raises the possibility that the federal hearing will be a review proceeding determining the correctness of that decision. But an exhaustion requirement does not, by itself, convert the federal hearing into a review proceeding. That depends on the statute under which the plaintiff brings suit.

That statute might direct the federal court to review the prior decision and set out standards of review. For instance, the habeas statute, 28 U.S.C. § 2254(d), instructs federal district courts to decide whether a state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." On factual questions, § 2254(e) prescribes that state-court

factual determinations "shall be presumed to be correct" and that the habeas applicant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Administrative Procedure Act, likewise, clarifies that APA suits are typically review proceedings by instructing courts to focus on agency decisions and setting out standards of review such as "substantial evidence" and "arbitrary, capricious [or] an abuse of discretion." See 5 U.S.C. § 706. So, too, do agency-specific statutes such as the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(4).

On the other hand, if the statute does not direct the court to review the prior decision or set out a standard of review, the natural conclusion is that a suit under that statute is an original proceeding. For instance, the Age Discrimination in Employment Act ("ADEA") requires would-be plaintiffs to commence available state proceedings and let them continue for sixty days or to termination before filing a federal suit. See 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979). Title VII of the Civil Rights Act of 1964 has a similar commencement provision and further requires would-be plaintiffs to file a complaint with the Equal Employment Opportunities Commission ("EEOC") and to receive a right-to-sue letter before initiating a federal action. See 42 U.S.C. § 2000(e)-5(e); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-111 (1988). But neither statute directs federal courts to review state decisions or those of the EEOC, and suits under Title VII or the ADEA are consequently original proceedings. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973) (explaining that Title VII suits are "*de novo* proceedings" rather than review of EEOC determinations).

II. Inmate Section 1983 Suits Are Original Proceedings

42 U.S.C. § 1983 allows individuals to seek a federal remedy for violations of their federal rights. Section 1983 suits are original proceedings. They do not ask federal courts to review the decisions of state courts or administrative bodies; they ask for review of out-of-court conduct claimed to violate federal rights. See, e.g., *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985) ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action.") (Posner, J.).

The Prison Litigation Reform Act ("PLRA") has not changed the nature of § 1983 suits. The PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a), provides that no inmate may bring suit under any federal law "until such administrative remedies as are available are exhausted." But unlike the habeas statute and the APA, the PLRA does not instruct federal courts hearing § 1983 suits brought by inmates to review the decisions of prison administrators or set out a standard of review. The statute gives no indication of an intent to transform § 1983 suits into review proceedings. The Solicitor General concedes that an inmate's § 1983 suit is a "*de novo*" proceeding. U.S. Br. 14 n.6.

Indeed, it is quite hard to imagine how a § 1983 suit could be a review of prison grievance proceedings. Such proceedings may not produce any reviewable findings, and they are not subject to the same due process constraints as trials or most administrative hearings; they may be inquisitorial rather than adversarial, and may restrict an inmate's ability to call witnesses or testify. Frequently,

prison administrators lack the ability to consider constitutional arguments or award the relief that a § 1983 plaintiff seeks, so overturning the denial of a grievance would not have the same consequences as ruling in an inmate's favor on an original § 1983 claim. (For descriptions of some prison grievance systems, see Brief of Jerome N. Frank Legal Services Organization as Amicus Curiae in Support of Respondent.)

III. Procedural Errors Bar Review Proceedings, Not Original Proceedings

The distinction between original and review proceedings is crucial for determining the consequence of a procedural error. In a review proceeding, the court assesses the decision of some other adjudicator. If that decision rests on a valid procedural ground, the court will usually uphold it as correct without reaching the merits of the plaintiff's claim.

It is this principle, and not exhaustion by itself, that is at work in the contexts in which improper exhaustion has been held to bar subsequent suit. In the habeas context, a prisoner who fails to observe state procedural rules "meets the technical requirements for exhaustion." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). What bars his petition is the doctrine of procedural default: federal courts will not consider the merits of claims rejected by state courts on procedural grounds. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 161-162 (1997) (discussing procedural default).

Procedural default, as this Court has repeatedly explained, "has its historical and theoretical basis in the 'adequate and independent state ground doctrine.'" *Harris*

v. Reed, 489 U.S. 255, 260 (1985). That is, procedural default is not merely a rule created by the Court for policy reasons; nor is it an inherent feature of exhaustion requirements. It exists because habeas petitions are review proceedings and federal courts cannot disrupt state judgments that rest on state-law grounds such as state procedural rules. See, e.g., *Gray*, 518 U.S. at 162 ("the procedural bar . . . provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default").

The operation of an exhaustion requirement by itself is seen in this Court's earlier habeas decisions such as *Fay v. Noia*, 372 U.S. 391 (1963), which reached the merits of habeas petitioners' claims despite procedural errors.* The introduction of the procedural default doctrine in *Wainwright v. Sykes*, 433 U.S. 72 (1977), resulted from a change in the Court's understanding of the nature of habeas – a change from an original proceeding to a review proceeding – which was subsequently codified in current 28 U.S.C. § 2254. See generally Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L. J. 1771, 1788-1798 (2003) (hereinafter "Exhaustion") (discussing procedural default and adequate and independent state ground and noting shift from original to review proceeding).

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* *Noia* did note that federal courts could deny relief to inmates who had "deliberately bypassed the orderly procedure of the state courts." 372 U.S. at 438. Amici take no position on whether a similar rule would be appropriate in the context of inmate § 1983 suits.

In the administrative law context, likewise, failure to observe an agency's procedural requirements will produce an agency decision resting on a procedural ground. If the application of the procedural requirement is correct, that decision cannot be overturned in a review proceeding. As this Court has explained, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines Inc.*, 344 U.S. 33, 37 (1952).

The Solicitor General offers two contexts in which, he argues, federal appellate courts have interpreted exhaustion provisions to require timely presentation of claims to administrative agencies: the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and the Immigration and Nationality Act, 8 U.S.C. § 1252(d)(1).

The Railroad Unemployment Insurance Act in fact uses language quite different from that of the PLRA. It permits review of "final decisions" on the condition not simply that remedies "are exhausted" but that they "*will have been availed of* and exhausted." 45 U.S.C. § 355(f) (emphasis added). This language might indeed be understood to require that the plaintiff make timely filings in order to "avail" himself of administrative remedies. In fact, however, it has generally not been understood that way. The Solicitor General's suggestion that courts of appeals have "uniformly" concluded that untimely claims constitute a failure of exhaustion, U.S. Br. 11, is a substantial overstatement. That is a minority position among the circuits, held by the Third and the Sixth. See *Cunningham v. Railroad Ret. Bd.*, 392 F.3d 567, 572 (3d Cir. 2004); *Gutierrez v. Railroad Ret. Bd.*, 918 F.2d 567, 5670 (6th Cir. 1990).

The Fourth, Seventh, Ninth, and Tenth Circuits, by contrast, have not found a failure to exhaust but rather concluded that a Board decision dismissing an appeal as untimely is not a "final decision" and therefore not reviewable. See *Rivera v. Railroad Ret. Bd.*, 262 F.3d 1005, 1010-1011 (9th Cir. 2001) (decision not "final" because not "on the merits"); *Harris v. Railroad Ret. Bd.*, 198 F.3d 139, 141-142 (4th Cir. 1999) (decision to reopen not provided for by statute, hence not susceptible to judicial review) *Abbruzzese v. Railroad Ret. Bd.*, 63 F.3d 972, 974 (10th Cir. 1995) (decision not to reopen is "discretionary, and as such, is nonfinal and unreviewable"); *Steebe v. U.S. Railroad Ret. Bd.*, 708 F.2d 250, 254 (7th Cir. 1983) (no review because reopening decision not provided for by statute); *Cunningham*, 392 F.3d at 572 n.6 (discussing split). The Second and the Eighth Circuits will in fact review decisions not to reopen under an abuse of discretion standard. See *Sones v. Railroad Ret. Bd.*, 933 F.2d 636, 638 (8th Cir. 1991); *Szostak v. Railroad Ret. Bd.*, 370 F.2d 253, 254 (2d Cir. 1960). And some circuits will review the decisions if they present colorable constitutional issues. See, e.g., *Harris*, 198 F.3d at 142-143 (citing cases).

The Immigration and Nationality Act cases are similar. The statutory language, requiring that "the alien has exhausted all administrative remedies available," could be read to require active utilization of remedies. 8 U.S.C. § 1252(d)(1). (As the next section of this brief shows, however, this Court has rejected that reading of the similar language in the habeas statute.) Some circuits have held that an untimely appeal of an immigration judge's decision is a failure to exhaust. See, e.g., *Sswajje v. Ashcroft*, 350 F.3d 528, 532 (6th Cir. 2003). But what they mean by this is that because the agency decision rests on a

procedural ground, a reviewing court will not reach the merits; it is the procedural ground, if anything, that is reviewable. The *Sswajje* court did indeed review the agency's decision not to entertain the untimely appeal, something that a true failure to exhaust should have prevented. See *ibid.*

What all the circuits agree on with respect to both statutes is that plaintiffs who have committed a procedural error cannot obtain judicial review of the merits of the agency's handling of their claim. They are entitled, at most, to review of the procedural decision to dismiss the appeal or not to reopen the proceeding. That is certainly correct, but it is not really the operation of an exhaustion requirement – or at least, it is the operation of an exhaustion requirement only in the context of a review proceeding. It is, like the procedural default rule in habeas, a recognition of the two crucial facts that (1) the plaintiffs are attacking a prior decision and (2) a procedural ground may shield that decision in a review proceeding.

The same reasoning underlies the *L.A. Tucker* principle that the Solicitor General endorses as a general statement of the administrative exhaustion rule, U.S. Br. 11: waiver limits the possible grounds of review. That reasoning has no application to an original proceeding such as a § 1983 action, because an original proceeding does not seek review of any prior decision. The basis for the earlier decision is thus irrelevant; a procedural disposition is no different from a decision on the merits. Procedural errors do not bar subsequent original proceedings.

IV. The Text of the PLRA's Exhaustion Requirement Does Not Support a Procedural Default Rule

The conclusion that follows from the preceding sections is there is no logical reason that an exhaustion requirement should convert a procedural error into a bar for a subsequent original proceeding. Such a bar does arise in subsequent review proceedings, but that is because they are review proceedings, not because of the exhaustion requirement. (Indeed, the bar arises in review proceedings even in the absence of an exhaustion requirement.) Congress could, however, have written a statute that imposed such a bar on inmates who failed to meet time limits, and it is therefore necessary to consider the text of the PLRA.

The Solicitor General's "textual" argument is that this Court should substitute "properly exhausted" for "exhausted" in § 1997e. U.S. Br. 9-10. As the preceding section demonstrated, that argument is supported by a minority of the federal circuits in some administrative contexts, resoundingly rejected by this Court's habeas decisions, and conceptually flawed in any event because it relies on cases dealing with review proceedings.

Petitioners offer a different textual argument, that whether remedies have been exhausted depends not on whether they are available, but whether they have been used. That is, they suggest that a prisoner must in fact *use* a remedy in order to exhaust it – invoking the remedy and having the request denied on non-merits grounds is not enough. Pet. Br. 14-15. The argument would be more plausible if the PLRA employed an active voice, requiring, as does the habeas statute, that "the applicant ha[ve] exhausted the remedies available." But it would still be wrong. In the habeas context, that reading was endorsed

by this Court in *Brown v. Allen*, 344 U.S. 443, 484-487 (1953) (interpreting 1948 statute), but then rejected ten years later by *Fay v. Noia*, 372 U.S. 391, 434 (1963), which pronounced it "refuted by the language of the statute and by its history."

On other points, *Noia* has itself been overruled by *Coleman v. Thompson*, 501 U.S. 722 (1991). But its interpretation of "exhausted" stands. For over forty years now, this Court's habeas cases have repeatedly made clear that availability of remedies is the sole criterion for exhaustion. Proper use or invocation of remedies is not required, for the exhaustion requirement "refers only to remedies still available at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 126 n.28 (1982). Once remedies are unavailable, for whatever reason, an exhaustion requirement is satisfied. This understanding of exhaustion was clear at the time the PLRA was enacted. See, e.g., *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (exhaustion requirement "is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law'") (alterations in original) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Given that the Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents, *United States v. Wells*, 519 U.S. 482, 495 (1997), Congress's choice to require only that "such administrative remedies as are available are exhausted" should be understood to incorporate the availability test, not the distinct doctrine of procedural default.

Petitioners and the Solicitor General seem to suggest that the Court abandoned this understanding in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Pet. Br. 27-28; U.S. Br. 12-13. Even if true, the suggestion would not be

relevant to the interpretation of a statute enacted in 1996. But it is not true. *Boerckel* explicitly distinguished between the exhaustion question ("whether a prisoner has exhausted his state remedies," 526 U.S. at 848) and the procedural default question ("whether he has *properly* exhausted those remedies," *ibid.* (emphasis in original)). When the Court found that the petitioner had not properly exhausted his state remedies, it concluded not that he had failed to exhaust them, but that he "ha[d] procedurally defaulted his claims." *Ibid.* See generally Roosevelt, *Exhaustion*, 52 Emory L.J. at 1785-88 (discussing *Boerckel*).

Congress could have required inmates to comply with procedural requirements on pain of forfeiting their right to an original § 1983 action. In Title VII, for instance, Congress required would-be plaintiffs to make a timely filing with the EEOC or suffer just such a forfeiture, even though the Title VII suit is an original proceeding. See 42 U.S.C. § 2000e-5(e). In setting the general limitations period for suits against the United States, Congress again placed an explicit forfeiture condition on timely administrative filings: "A tort claim against the United States shall be *forever barred* unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . . " 28 U.S.C. § 2401(b) (emphasis added).

But the PLRA does not impose such a requirement. Instead, Congress used the standard language of exhaustion, explicitly setting "availab[ility]" of administrative remedies as the test for whether a federal suit can be filed. See 42 U.S.C. § 1997e(a). And because a § 1983 suit is an original proceeding, a bar does not arise naturally as it does in review proceedings such as habeas petitions or

review of administrative decisions. To impose a bar as a penalty for improper exhaustion would be to rewrite the statute and add a condition that Congress omitted.

V. Policy Considerations Do Not Support the Addition of a Procedural Default Rule

The Court's analysis might well stop at this point. But consideration of the policy issues at stake is worthwhile, for it demonstrates that the statute Congress wrote is a sensible and well-functioning one. It accommodates both the goal of reducing the number of frivolous suits and the goal of allowing inmates with valid claims a day in court, and it does not require judicial augmentation.

The purpose of the PLRA exhaustion requirement is "to reduce the quantity and improve the quality of prisoner suits" by affording "corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-525 (2002). Some inmates may be satisfied with the administrative remedy they receive, thereby "obviat[ing] some litigation." *Booth v. Churner*, 532 U.S. 731, 736 (2001). Congress hoped, that is, that at least some complaints could be resolved to the inmate's satisfaction through the grievance process, without making a federal case out of them.

These policy concerns are familiar; they are the same ones that inspired Congress to require would-be plaintiffs under Title VII and the ADEA to invoke state remedies before filing a federal suit. See *Oscar Mayer*, 441 U.S. at 755 (noting that Congress required the commencement of state proceedings "to screen from the federal courts those problems of civil rights that could be settled to the

satisfaction of the grievant 'in a voluntary and localized manner") (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 127 (1988); *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003) (noting analogy). This Court has already considered whether those policy concerns make it appropriate to impose a bar on would-be plaintiffs who fail to meet state procedural requirements. It has said that they do not, for reasons strikingly applicable to the context of PLRA exhaustion.*

In *Oscar Mayer*, the Court noted that imposing a bar to ADEA suits by plaintiffs who had failed to observe state procedural rules would be particularly inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." 441 U.S. at 760 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). Given that the ADEA contained its own limitations period, the Court declined to impute to Congress an intent to "incorporate by reference into the ADEA the various state age-discrimination statutes of limitations . . . particularly since, in many States . . . the limitations periods are considerably shorter" than the federal limits. *Id.* at 763. The Court also noted the concern that requiring compliance with state

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* Admittedly, the *Oscar Mayer* Court apparently thought that there was something different about exhaustion. See 441 U.S. at 761 (noting that the ADEA commencement provision "does not stipulate an exhaustion requirement"). The Court did not explain this remark any further, but it may have stemmed from an assumption that a suit following exhaustion is necessarily a review proceeding. If that were the case, procedural error in the course of exhaustion would invariably produce a bar. But as the preceding parts of this brief have demonstrated, the assumption is false. A Section 1983 suit filed after exhaustion of administrative remedies is an original action, and an exhaustion requirement does not necessarily include a procedural default doctrine.

procedural rules would allow "localities hostile to civil rights [to] enact sham discrimination ordinances for the purpose of frustrating the vindication of federal rights." *Ibid.*

Each of these concerns operates with equal force in the context of PLRA exhaustion. Inmates are extremely unlikely to have the assistance of counsel when they are pursuing administrative remedies. Administrative deadlines are far shorter than the limitations periods for § 1983 actions, generally requiring inmates to act within a few weeks or even a few days. See Brief of Jerome N. Frank Legal Services Organization as Amicus Curiae in Support of Respondent (describing state grievance procedures). Making these deadlines into de facto limitations periods would have grave consequences for the ability of inmates to obtain a judicial hearing, a result this Court has rejected before. See *Burnett v. Grattan*, 468 U.S. 42 (1984) (holding state administrative filing deadline inappropriate for incorporation as limitations period for § 1983 suit).

Worse, barring the § 1983 suits of inmates who have failed to comply with procedural requirements gives prison administrators an undesirable incentive to use their grievance systems not as problem-solving devices but as litigation defenses, erecting higher procedural hurdles and refusing to address the merits of inmate grievances. Indeed, evidence suggests that administrators have responded to federal decisions imposing such a bar in just this way. Following the Seventh Circuit's decision in *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002), which announced that grievances "must contain the sort of information that the grievance system requires," Illinois amended its grievance procedures to require that each grievance "contain factual details regarding each aspect of

the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint." See 27 Ill. Reg. 6214 (2003) (amending 20 Ill. ADC § 504.810).

On the other side of the balance, *Oscar Mayer* identified as the "strongest argument" the fear that without a bar, plaintiffs might simply "wait[] until the state statute of limitations has expired and then fil[e] federal suit, thus frustrating the intent of Congress that federal litigation be used as a last resort." 441 U.S. at 764. This is the same policy concern that petitioners invoke. See Pet. Br. 19. But the *Oscar Mayer* Court went on to discount this fear, noting that "no reason suggests itself . . . why an employee would wish to forgo an available state remedy." *Ibid.* The same point holds for inmates.

Indeed, in the PLRA context, it is considerably stronger. Because prison administrators generally have the power to hear untimely grievances, prisoners cannot simply wait until filing deadlines have passed: administrative remedies will remain available until they have been sought and denied. See, e.g., Wisc. Admin. Code §§ DOC 310.09(6); 310.13(2) (2005). Thus, prisoners cannot exhaust remedies by neglect, or skip the process; they will still be required to file grievances and pursue them through the entire administrative process before they can initiate a federal suit. These filings will give administrators the ability to act on the grievances or create records if they choose. Imposing a bar on inmates who make procedural errors is not necessary to protect the policy aims of the exhaustion requirement. See generally Roosevelt, *Exhaustion*, 52 Emory L. J. at 1808-1814.

Petitioners argue that the appropriate analogy for policy analysis is not the commencement requirements of Title VII and the ADEA but rather the exhaustion requirement of federal habeas. See Pet. Br. 26-30. But the policy considerations that the Court has identified as supporting the procedural default rule in the habeas context do not apply in the same way to PLRA exhaustion. In the habeas context, procedural default operates to protect the role of state courts as the preferred fora for the determination of whether criminal defendants may be deprived of liberty. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (noting that criminal trials should be "the main event" and not a "tryout on the road" to federal habeas). State courts are equally competent to decide federal constitutional claims, and they have primary responsibility for the application and enforcement of state criminal law. The procedural default rule protects state judgments from unwarranted disruption by federal courts.

The same arguments cannot be made with respect to prison grievance proceedings and § 1983 suits. Prison administrators are not equally competent to decide federal constitutional claims; frequently they are not even empowered to consider such claims. Nor must their hearings comply with the due process requirements that govern suits in federal and state court, and even prison disciplinary proceedings resulting in the loss of good time credits, see *Wolff v. McDonnell*, 418 U.S. 539 (1974). See generally *Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (noting differences between judicial proceedings and prison disciplinary proceedings). Administrative grievance proceedings cannot be the main event in a prisoner's civil rights suit; as this court has noted, "the dominant characteristic of civil rights actions" is that

"they belong in court." *Burnett*, 468 U.S. at 50. And because a § 1983 suit does not attack grievance proceedings, they do not need, and cannot sensibly be given, the protection of a procedural default rule.*

Imposing a bar on prisoners who make procedural errors in the course of exhaustion is supported neither by the text of the statute, nor by the policy goals behind exhaustion. Such a bar would certainly "filter out" a large number of civil rights suits, but it would do so on a basis unrelated to their merits. Indeed, because recreational litigators are likely to have more experience with the grievance system, a procedural default rule would tend to block meritorious claims, rather than frivolous ones. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("As a practical matter, the filing deadlines, of course, may pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions. But they are a likely trap for the inexperienced and unwary inmate, ordinarily

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* Petitioners and the Solicitor General seek to bolster the analogy by appeal to *Preiser v. Rodriguez*, 411 U.S. 475 (1973), arguing that the Court there recognized that prison administration implicates federal-state comity to the same extent as state criminal proceedings. Pet. Br. 28-29; U.S. Br. 15. But *Preiser* dealt with prison disciplinary proceedings, and what was at stake was whether the inmates were entitled to immediate release. Whether an inmate is entitled to release or can be required to forfeit good-time credits under prison regulations is a question within the expertise of prison administrators; constitutional questions are not. And the issue in *Preiser* was under what conditions federal courts could override the decisions of those administrators. That is, the federal suits in *Preiser* were review proceedings, implicating the states' interest in the integrity of their official decisions and the fact or duration of confinement. Section 1983 suits do not seek to set aside such decisions and cannot affect an inmate's sentence, and for those reasons this Court has treated them differently. See, e.g., *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005) (distinguishing *Preiser*); *Muhammad v. Close*, 540 U.S. 749 (2004) (same).

indigent and unrepresented by counsel, with a substantial claim."). This is a consequence that the sponsors of the PLRA explicitly disavowed. "Indeed, I do not want to prevent inmates from raising legitimate claims," said Senator Hatch. "This legislation will not prevent those claims from being raised." 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); see also 142 Cong. Rec. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it.").

Congress was, of course, concerned about frivolous suits. Other sections of the PLRA specifically target frivolous suits and recreational litigators. 28 U.S.C. § 1915(b) requires even prisoners proceeding in forma pauperis to pay filing fees by installment; § 1915(e)(2) instructs district courts to dismiss frivolous suits sua sponte; § 1915(g) denies in forma pauperis status to inmates, except those in imminent danger of serious physical injury, who have had three actions or appeals dismissed as frivolous, malicious, or failing to state a claim; and 42 U.S.C. § 1997e(e) prohibits suits for mental or emotional injury unaccompanied by physical injury. These provisions do work to filter out frivolous suits and deter the prisoners who file them. As petitioners note, the rate of inmate litigation has dropped dramatically since the enactment of the PLRA. See Pet. Br. 21-22 (noting a "roughly 50 percent decrease" in the filing rate for inmate civil rights suits from 1995 to 2000).

Petitioners go on to suggest that this success "will undoubtedly be reversed" if this Court upholds the decision below. Pet. Br. 22. But the reduction in inmate filings occurred in a legal environment *without* a procedural default rule. The first federal appellate decision to

squarely hold that a procedural error would bar a civil rights suit came in 2002. See *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002). Before that, federal courts regularly dismissed without prejudice the suits of inmates who had failed to properly exhaust their administrative remedies, stating that the inmates could subsequently exhaust those plainly time-barred remedies and return to court. See, e.g., *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998); see generally Roosevelt, *Exhaustion*, 52 Emory L.J. at 1780-1781 (discussing pre-Pozo cases).

What this means is that the PLRA provisions that target frivolous suits and recreational litigators work as intended. Congress did not choose to supplement the precise and selective operation of those provisions with the blunt and counterproductive hammer of a procedural default rule, and no such supplement is needed. The exhaustion requirement simply directs prisoners into the administrative grievance process in the hope that some of the more trivial complaints can be adequately resolved at that stage. It was not intended to operate as a barrier to meritorious claims, and if applied as written, it does not do so. Congress's decision was eminently reasonable, and this Court should respect it.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

KERMIT ROOSEVELT III
Counsel for Amici Curiae
University of Pennsylvania
Law School
3400 Chestnut St.
Philadelphia, PA 19104
215.746.8775

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